

NEWSLETTER

HOME-MADE WILLS – A CHEAP OPTION?

The difficulties and pitfalls of drafting and executing your own Will were highlighted recently in a High Court case in Hamilton. The Court heard of a person that created and signed two Wills on the same day. Which was the one that accurately reflected his wishes?

Mr M had obtained a 'home made will kit' and used it to record his testamentary intentions. The problem arose after he died, when it was discovered that he had executed two documents both of which purported to be his last Will and Testament.

The two documents were dated "8th December 2000" and "8th 2000" respectively. Both documents were signed by the same witnesses, and the evidence presented to the Court established that the Wills were signed on the same day, but no one could remember which one had been signed first.

The difficulty arose when the trustees appointed in the Wills tried to obtain probate for the Wills. (Probate gives the trustees and executors the power to deal with the property of Mr M and to disperse his property in accordance with his wishes). In this case, the application for probate

required a formal application to the High Court and required all people affected by the Wills, and who might have some claim to the estate, being served with the proceedings and being required to instruct solicitors to represent them.

Fortunately, it was accepted by all concerned that both documents should be granted probate as the Wills were essentially of the same effect, with one Will being slightly more detailed version of the other. In those circumstances, where there was essentially no dispute over the Wills, the Court was able to make orders that suited all parties.

If there had have been a dispute, or if the contents of the Wills were significantly different to each other the case would not have been so straight forward.

In any event the matter was not resolved until it went to Court, some 18 months after Mr M's death.

The Court awarded costs of \$3,337.50 to each of the two groups of beneficiaries, both of whom were represented by solicitors. Those costs, as well as those of the solicitors for the estate, and the disbursements incurred in the proceedings, were all paid from the estate. The costs awarded were undoubtedly used up in legal fees.

Potential Problems

There are dangers in preparing your own Will. If it is incorrectly signed or witnessed, it will not be valid, and in preparing your own Will you run the risk that it will not adequately deal with the distribution of your assets, and the beneficiaries will need to resort to costly legal proceedings.

OUR WEBSITE

Visit us on the internet at www.turnerhopkins.co.nz.

NEWSLETTERS

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The law relating to Wills and their administration is very specific, and strictly adhered to. The Court is very conservative when dealing with estate matters as its only guidance is the written wishes of the person who has now died.

If those wishes are ambiguous, or there is a problem with the execution of the Will, the beneficiaries will suffer due to costs and delays as a result.

Turner Hopkins are pleased to provide simple Wills for our clients at no charge (sometimes more complicated Wills in special circumstances incur a nominal fee). We recommend that you update your Will every five years to take into account any likely change in circumstances. In order to ascertain the current status of your Will, prepare a new Will, or update an existing Will, please contact Raechel Pedrotti of our Estates Planning Department.

WORKPLACE BULLYING

IS IT THE EMPLOYEE PERSONAL GRIEVANCE OF THE NEW MILLENNIUM?

Once the domain of the school yard, bullying has now been recognised as having moved into the workplace. However, given the lack of comprehensive research into workplace bullying in New Zealand, it is difficult to assess the prevalence of this phenomenon locally.

What Is Workplace Bullying?

There are numerous definitions of workplace bullying, yet all contain several salient features.

In summary, workplace bullying can be described as:

- Repetitive, health-endangering behaviour that amounts to mistreatment and that has a detrimental effect on an employee's dignity, safety and well being;

- Behaviour that is about the bully's need for control; and
- Focused and systematic selection of targets.

Typical workplace bullying can involve physical behaviour, hostile communication (both verbal and non-verbal), interfering actions, withholding of resources, threats, abuses of power, isolating and degrading behaviours.

What To Look For

Symptoms affecting performance for employees to be wary of include lower concentration, low morale, exhaustion, apathy, burnout, anxiety, and depression.

The Relevant Law

Statutory recognition and protection from workplace bullying is limited to amendments to the Health and Safety in Employment Act 1992 (HSEA). These amendments place robust general duties on both employers and employees. Importantly, the HSEA now places specific duties on employers in relation to "hazard management".

The amendments specifically relating to workplace bullying extend the definition of "harm" and "hazard" to include "stress" and "fatigue". As noted above, anxiety (stress) and exhaustion (fatigue) are primary symptoms of an employee who is the target of a workplace bully.

How Does This Affect Me As An Employer?

A common response to the concept of workplace bullying is that competent management of employees requires "tough", "straight talking", "strong people". Further, complainants of workplace bullying need to "harden up" – they are "trouble makers", "weak" or "undesirable" employees. However, employers must realise the effect that bullying can have on the morale of the staff and, at the bottom line, the effectiveness or productiveness of employees.

The risk and in particular the costs associated with workplace bullying must be carefully considered before such attitudes prejudice employers against taking all practical steps to protect employees against workplace hazards, such as stress caused by workplace bullying.

End Result

The risks and costs for employers associated with workplace bullying are:

- decreased productivity;
- increased absenteeism;
- high staff turnover;
- costs related to temporary staff, recruitment and training.

Additional costs include exit packages or settlement agreements for complainants of workplace bullying, costs of litigation and associated legal fees.

Employers face potential liability for personal grievance claims under the Employment Relations Act 2000 and/or claims for breach of their statutory duty to provide a safe and secure workplace. A person convicted of an offence against the HSEA is now potentially liable for custodial sentences (maximum 2 years) and/or fines (maximum \$500,000.00).

In Conclusion

Workplace bullying with its increasing recognition and awareness appears set on a path that will raise questions both for employers and employees. Its implications have the potential to be far reaching and costly for all parties involved. However, a proactive employer will take steps to minimise the chances of workplace bullying by maintaining good communication with employees. This will lessen risk to the employer and will go a long way to ensuring a good working environment for his employees.

Employment Law In General

Do you have a situation developing in your workplace that may require action? If so, you should know that many courses of action are regulated and law and appropriate procedures should at all times be followed. It may only take a five minute phone call to Turner Hopkins

to ensure that your proposed course of action as an employer or employee complies with relevant laws. If you have any questions relating to employment, either as an employer or an employee, Michael Robinson or Helen Wendelborn of this office welcomes your calls.

TERMS OF TRADE – ARE YOURS UP TO SCRATCH?

If you are in business and have occasion to extend credit to your customers, are your terms of trade adequate to ensure the effective and efficient collection of unpaid accounts?

Your terms of trade need to be effective and work for you. Too often terms of trade are ambiguous and do not adequately provide for personal guarantees, collection costs and security over items sold. If you are wondering whether or not your terms of trade are adequate, here are a few questions for you to consider.

Compliance With The PPSR

The enactment of the Personal Property Securities Act 1999 ("Act") changed the provisions for taking security over personal property as a form of securing payment. Do your terms of trade reflect those changes to comply with the Act? Are you aware that retention of title clauses are no longer effective?

Interest On Unpaid Amounts

Can you charge interest on unpaid accounts? This must be provided for in your terms of trade. Otherwise you are limited to the statutory rate imposed by the Court, which can only be charged after you have obtained a Court Judgment against your customer.

Personal Guarantees

Do you have provision for a personal guarantee? These are a very valuable tool in collecting unpaid accounts. However, personal guarantees must be in writing, be clear and unambiguous and executed in a way that ensures that the person

signing realises that they are to be held personally liable to pay you if the customer or borrower does not. If the guarantee is not clear or not properly executed it may not be enforceable, and you may lose the last opportunity you have to get paid, especially if your customer is a company that has gone into liquidation or has otherwise ceased trading.

Recovering Costs

Can you recover your actual costs (including lawyer's fees) of pursuing someone that does not pay? Again you can, but only if you provide for it in your terms of trade. Otherwise you are limited to the amounts set by statute for "costs" in Court proceedings. Those "costs" are low and do not reflect the actual costs incurred in instructing a lawyer to assist in pursuing a reluctant payer.

Location Of Court Proceedings

Do you supply to customers who are based out of town or in other centres? If you do, do you realise that you must issue any Court proceedings against them in the Court nearest to them – unless of course your terms of trade specify that you can issue in any Court that suits you.

It's Worth The Effort Of Getting Them Right

Of course, terms of trade cannot guarantee that you will in fact get paid. However, the better they are the more likely you are to be able to effectively obtain payment of not only the amount owing to you, but the costs of doing so, as well as interest on the amount outstanding. You may also improve your chances of getting paid if the guarantee provision in your terms of trade is effective and enforceable, as a customer may think twice about not paying.

Your lawyer is the best person to advise you on what should be in your terms of trade and how to best ensure that the terms you trade on are yours, and not that of your customer. Please contact Mike Newdick or John Stirling of this office for assistance.

STAFF NEWS

Claire O'Donnell, our Senior Associate in the Litigation/Family Law Department, has recently had a healthy baby girl and accordingly we expect she will be on maternity leave until early 2005. Congratulations to Claire and her husband Neil from everyone at Turner Hopkins.

Turner Hopkins Establishes International Legal Alliance

We are very pleased to advise our clients that we have been involved in the formation of an international legal alliance with law firms throughout Australia, South East Asia, the United Kingdom and the Indian sub-continent. We believe that this relationship will enable us to enhance the service we provide to our clients and ensure that any clients who require legal services in the jurisdictions represented by our alliance partners will be well represented and provided with an assured standard of legal advice and service. If you require legal services in Australia, the UK or throughout Asia, please contact us and we will make the necessary arrangements.

Disclaimer

All information in this newsletter is to the best of the authors' knowledge true and accurate. No liability is assumed by the authors, or publishers, for any losses suffered by any person relying directly or indirectly upon this newsletter. It is recommended that clients should consult a senior representative of the firm before acting upon this information.

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